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April 26, 2010

MEMORANDUM

TO: Council Chair Todd Apo
City and County of Honolulu

FROM: Councilmember Ann H. Kobayashi

RE: The City and County of Honolulu's Suspected Violations of the Requirements of HRS § 103D-304 In Awarding 85 Contracts for Professional Design Services

There are suspected violations in awarding 85 contracts and only three (3) are related to rail. This is a procurement issue and not a rail issue. We must maintain the integrity of the City.

Attachment

April 23, 2010

Honorable Ann Kobayashi
City Council
City and County of Honolulu
City Hall
Honolulu, Hawaii 96813

Re: The City and County of Honolulu's Suspected Violations of the Requirements of HRS §103D-304 In Awarding 85 Contracts for Professional Design Services

Dear Ann:

I am submitting the following information to you for your investigation under Hawaii Revised Statutes ("HRS") Chapter 103D, the Hawaii Public Procurement Code, and in particular § 103D-304, Procurement of professional services, and § 103D-707, Remedies after an award.

HRS Chapter 103D, Is the Hawaii Public Procurement Code

The Hawaii Public Procurement Code ("Code") was enacted in 1993 to establish a uniform government procurement policy "to be applied equally and uniformly to the State and counties." Act 8, Section 1 (1993) (S.B. No. S8-93). The Code accordingly states that it "shall apply to all procurement contracts made by government bodies" in the State of Hawaii (**HRS §103D-102 - Attachment 1**).

The Legislature also said in the Section 1 preamble to Act 8 (1993) that "It is the policy of the State to ensure the fair and equitable treatment of all persons who deal with the procurement system of the State and counties. Because public employment is a public trust, public employees must discharge their duties impartially to assure fair competitive access to government procurement by responsible contractors. Public employees shall conduct themselves in a manner that fosters public confidence in the integrity of the State procurement process. No comptroller, chief procurement officer, purchasing agency head, procurement officer, or employee whose duties include purchasing shall use or attempt to use one's official position to secure or grant unwarranted privileges, exemptions, or advantages or exhibit any favoritism or prejudice to any prospective bidder or contractor." (underscore added)

"It is the policy of the State to foster broad-based competition. Full and open competition shall be encouraged. With competition, the State and counties will benefit economically with lowered costs. . . ." (underscore added)

"It is the policy of the State to ensure fiscal integrity, responsibility, and efficiency in the procurement process. Goods, services and construction shall be purchased at fair and reasonable prices. . . ." (underscore added).

Under the Code, "[w]ritten determinations required" by the Code "shall be retained in the appropriate official files" (**HRS § 103D-103 - Attachment 2**), "[g]overnment records relating to procurement shall be available to the public" (**HRS § 103D-105 - Attachment 3**) and, among other penalties, "anyone who intentionally violates" the Code "shall be guilty of a misdemeanor", "[s]ubject to removal from office" and is "[l]iable to the . . . appropriate county for any sum paid by it in connection with the violation." (**HRS § 103D-106 - Attachment 4**).

The City and County of Honolulu has not issued any revised administrative rules or regulations after August 2000 and therefore must follow the Code and applicable, lawful Hawaii Administrative Rules ("HAR"), Title 3, Chapter 122, pertaining to Source Selection and Contract Formation, in awarding its contracts. See **HAR Subchapter 7, Procurement of Professional Services, §§ 3-122-63- 3-122-70 - Attachment 5**. HAR § 3-122-16, Methods of Source Selection, states that Subchapter 7 is to be used for the award of all government contracts for professional services.

In March 2005, City Auditor Leslie I. Tanaka noted in his report, "Audit of the City's Sole Source, Emergency, and Professional Services Procurement Practices," that "certain sole source, emergency, and professional services purchases approved by the city have either violated the state procurement code or city policies."

The suspected violations of the Code included in this letter are related to contracts for professional services and, specifically, contracts for design professional services of engineers, architects, land surveyors and landscape architects (**HRS § 464-1 - Attachment 6** and **HRS § 464-2 - Attachment 7**). Under the Code, contracts for design professional services are **not** awarded by "competitive sealed bidding" but are awarded pursuant to the requirements of either **HRS § 103D-304 (Attachment 8)** or **HRS §103D-307 (Attachment 9)**.

Requirements of HRS § 103D-304

Under HRS § 103D-304, "design professional services furnished by licensees under chapter 464 shall be procured pursuant to this section or section 103D-307." All of the violations of the Code relate to the City and County of Honolulu's awarding of contracts for design professional services by licensees under HRS Chapter 464.

Each year, design professionals submit "statements of qualifications and expressions of interest" to the City and County of Honolulu departments who purchase design professional services (HRS § 103D-304(b)). In turn the department heads, form a "review committee[s]" composed "of a minimum of three persons" who are impartial and independent to "review and evaluate all submissions" for formulating "a list of qualified persons to provide" design professional services" to these departments (HRS § 103D-304(c)).

After the overall list is prepared, the department head forms "selection committee" composed of a "minimum of three persons" who are impartial and independent to evaluate the qualifications of design professionals to perform a contemplated contract for design professional services for that department (HRS § 103D-304(e)).

From the overall list of qualified design professionals formulated each year, "[t]he selection committee shall rank a minimum of three persons . . . and send the ranking" to the department head (HRS § 103D-304(g)) ("Short List"). In addition under this section, "[i]f more than one person holds the same qualifications, . . .the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same qualifications."

From such Short List, the department head "shall negotiate a contract with the first ranked person including a rate of compensation that is fair and reasonable, established in writing, and based upon the estimated value, scope, complexity, and nature of the services to be rendered." (HRS § 103D-304(h) (underscore added). None of the contracts identified in this letter were "emergency procurements" under HRS § 103D-307 and, therefore, this statutory provision does not apply.

Violations of HRS § 103D-304

The City and County of Honolulu has violated the Code as follows:

A. Violations of HRS § 103D-304(h)

Since January 2005 and continuing through to the present, the City and County of Honolulu has failed to negotiate with the "first ranked person" on at least 72 Short Lists as mandated by HRS § 103D-304(h) and, as a result, has violated the Code requirement by contracting for design professional services a total of 72 times with persons **not ranked first** (**Attachment 10**).

This statute requires successive negotiations with each of the next ranked persons "[i]f a satisfactory contract cannot be negotiated with the first ranked person." This statute also requires that "the contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked or next ranked person."

In addition, HRS § 103D-304(h) states in relevant part that "[t]he contract file shall include documentation from the head of the purchasing agency, or designee, to support selection of other than the first ranked person or next ranked person."

The most egregious example of this is the August 26, 2005 contract award to **Parsons Brinckerhoff Quade & Douglas, Inc.** ("Parsons Brinckerhoff" nka PB Americas, Inc.) for the

Technical and Professional Services for the Honolulu High Capacity Transit Corridor Project in the initial amount of **$9,700,000.00 in spite of Earth Tech, Inc., being ranked first ahead of Parsons Brinckerhoff**.

There were also only two ranked firms for this project, which is a violation of HRS §103D-304(g), as is described below. The total contract payment was **$10,200,000**. This contract was for Parsons Brinckerhoff produce an Alternatives Analysis and draft environmental impact statement ("EIS") for the rail project, which includes the now controversial airport rail alignment that will require the realignment of two runways or realignment of the rail line at significant City taxpayer expense.

Other examples that are documented in **Attachment 10** of the City's violations of **not** selecting the first ranked person are:

Shimabukuro, Endo & Yoshizaki, Inc. was awarded the contract for the Design of Bus Stop ADA Accessibility Improvements, Phase V Project, in the amount of $137,170 **without appearing** on the Short List.

Environet, Inc. ("Environet") was awarded the contract for Consultant Services for Sand Island Waste Treatment Plant Expansion, Primary Treatment, Soil Management Project, in the amount of $700,000.00 **despite Earth Tech, Inc., being ranked first ahead of Environet**.

B. Violations of HRS § 103D-304(g)

Since January 2005, the City and County of Honolulu has also failed to submit a Short List containing a "minimum of three persons" to the department head and, as a result, violated the Code requirement by contracting for design professional services a total of 13 times with persons listed on Short Lists not containing the minimum of three persons **(Attachment 11)**.

The most egregious an example is **InfraConsult, LLC** ("InfraConsult") (formed by three former Parsons Brinckerhoff employees) that was awarded a contract for Project Management Support Services for the Honolulu High Capacity Corridor Project in the amount of **$36,727,162.00** from a **Short List listing only InfraConsult** and no other persons.

The InfraConsult contract was awarded on November 19, 2009 and the award was posted the following day on the State & County Professional Service Awards website. This appears to be an exceptionally short time period in which InfraConsult had to: (1) complete scoping all of the details of work specified in the contract proposal, (2) complete all negotiations with the City, and (3) obtain all signatures and approvals, for such a large contract, unless InfraConsult knew well in advance of November 19, 2009 that it was assured of receiving this award, and it had also completed virtually all of these steps before the award was announced.

Mr. Tanaka's March 2005 audit stated as his first finding: "Certain city sole source contracts have violated the state procurement code and city policies. There are indications of a pervasive level of procurement code violations. Anti-competitive practices are contrary to the law and costly for taxpayers." The City and County of Honolulu's issuing its contract to InfraConsult is a current example of this type of violation.

Interestingly, on August 24, 2007, Parsons Brinckerhoff was also awarded by the City and County of Honolulu an **$86,000,000** contract for general engineering consultant services for preliminary engineering and for the final EIS for the rail project.

Parsons Brinckerhoff was the first ranked of only two firms for this project. However, The Honolulu Advertiser reported on September 15, 2008 that then-City Department of Transportation Director Melvin Kaku waived the minimum of three persons requirement in § 103D-304(g) two days before the selection committee met on July 12, 2007 and ranked Parsons Brinckerhoff first for this contract. This waiver is a violation of HRS § 103D-304(g).

The newspaper also reported that the posting for this contract with Parsons Brinckerhoff first appeared on the City's website on June 5, 2007 and in a Honolulu Star-Bulletin classified ad on June 16, 2007, and that one selection committee member, Lorrie Stone, said that the City should have done more to publicize the contract.

The newspaper reported that bidding for this contract closed on July 5, 2007 and that "Committee members were told by a city transportation official that their role was to decide which firm was better qualified, rather than to question city solicitation procedures." This reported comment is contrary to the legislative intent and the explicit language of HRS § 103D-304(e) and (f) described below.

The same Honolulu Advertiser article reported that Parsons Brinckerhoff was the program manager and coordinator for the San Juan, Puerto Rico eleven (11) mile long Tren Urbano, urban train project, which cost $2.23 billion when it opened, more that double the planned cost. According to the Federal Transit Administration, this project was the largest cost overrun of any recently opened federally subsidized train project and the actual ridership has been far short of Parsons Brinckerhoff's projections. The projected ridership was 82,000 per day. However, as of August 2007, two years after the train started running, the actual highest daily ridership was 33,000 and the average daily ridership was reportedly 32,000. The originally estimated daily ridership for 2010 was 113,000. The Governor of Puerto Rico has recently reportedly decided to change phase II of Tren Urbano to a Bus Rapid Transit system instead of the originally planned continuation of the heavy rail line.

The Honolulu Advertiser article also reported that Parsons Brinckerhoff was involved with the Bechtel Group in co-mismanaging the so-called "Big Dig" massive highway and tunnel

project under the Charles River in Boston. The project ultimately cost $14.79 billion and was most expensive highway project in the nation. The original project cost was $2.6 billion.

In January 2008, Parsons Brinckerhoff f and Bechtel reached a settlement agreement with U.S. Attorney of the District of Massachusetts and the Attorney General of Massachusetts to pay $407 million to settle a lawsuit after a tunnel ceiling collapse, which caused a motorist's death. As part of the settlement agreement, Bechtel and Parsons Brinckerhoff admitted to several specific oversight failures concerning the collapsed ceiling as well as to filing safety and completion documents that were not true and accurate. Parsons Brinckerhoff paid $47.2 million of the settlement. The settlement was announced on January 23, 2008 by U.S. Attorney for the District of Massachusetts Michael Sullivan and Massachusetts Attorney General Martha Coakley.

Mr. Sullivan said "The citizens of Massachusetts entrusted Bechtel/Parsons Brinckerhoff to act as their eyes and ears on the Central Artery Project. They grossly failed to meet their obligations and responsibilities to the citizens of Massachusetts and the United States." Sullivan said that Bechtel/Parsons Brinckerhoff made $150 million in profit from the project, but "[t]hey lost money as a result of the failures that occurred under their watch." Ms. Coakley said "[i]t's clear from the pattern that we saw over a period of time that there was cutting of corners, there was failure to follow up, there was lack of oversight. I think there was a desire to move (the project) along and get it done."

In the joint press release issued on the settlement, Mr. Sullivan said, "[t]oday's settlement with Bechtel/Parsons Brinckerhoff is continuing evidence of our commitment to vigorously investigate and prosecute those who have perpetrated a fraud on American taxpayers. It is critically important that federal and state tax dollars needed to fund important public works projects, like the Big Dig, are safeguarded against waste, fraud and corruption."

Theodore L. Doherty III, Special Agent-in-Charge, U.S. Department of Transportation Office of Inspector General said in this joint press release: "It is important to ensure that taxpayers' investments in the construction and management of large transportation projects are protected from false claims that undermine public confidence in the integrity of our Nation's transportation system. . . .We will continue to work with the Federal Highway Administration and the U.S. Department of Justice to promote the detection and prosecution of fraudulent schemes involving Federal transportation funds."

Warren T. Bamford, Special Agent-in-Charge of the Federal Bureau of Investigation, New England Field Division said in the same joint press release: "Those who commit fraud and abuse against government programs will be aggressively investigated. These practices were completely irresponsible and an affront to the American public."

The U.S. Attorney's office for the District of Massachusetts has posted relevant Big Dig project investigation and prosecution documents, including its January 23, 2008 press release of the settlement with Bechtel and Parsons Brinckerhoff, at:
http://www.justice.gov/usao/ma/bigdig.html.

Parsons Brinckerhoff was also a major consultant on the H-3 highway project which was originally estimated to cost $70 million but after more than 20 years of lawsuits, it cost $1.3 billion. The lawsuits were based on flawed EIS and archeological studies. The U.S. District Court ruled in favor of the plaintiffs, *Stop H-3 Association v. Andrew L. Lewis*, 538 F.Supp. 149 (D. Hawaii 1982), and on appeal to the U.S. Ninth Circuit Court of Appeals, the judgment was affirmed. *Stop H-3 Association v. Elizabeth H. Dole*, 740 F.2d 1442 (9th Cir. 1984). The Court determined that there had been "constructive" taking of park land, based on a violation of section 4(f) of the U.S. Department of Transportation Act, which protects public lands and historic sites. In 1986, Congress approved an exemption to section 4(f), which allowed the project to proceed.

Parsons Brinckerhoff's poor management on the San Juan rail project and mismanagement on the Big Dig project should have been thoroughly investigated and evaluated by the City administration and by all of the selection committees before Parsons Brinckerhoff was ranked by any selection committee for any rail project contract. The selection criteria in HRS § 103D-304(e)(2) is: "Past performance on projects of similar scope for public agencies or private industry, including corrective actions and other responses to notices of deficiencies." (underscore added). Moreover, the City Administration should have re-evaluated Parsons Brinckerhoff's performance following the January 23, 2008 Big Dig settlement announcement.

The selection criteria in HRS § 103D-304(e)(4) is: "Any additional criteria determined in writing by the selection committee to be relevant to the purchasing agency's needs or necessary to ensure full, open, and fair competition for professional services. (underscore added).

HRS § 103D-304(f) states in relevant part: "The selection committee shall evaluate the submissions of persons on the list prepared pursuant to subsection (c) and any other pertinent information which may be available to the agency, against the selection criteria. (underscore added).

The City's investigation and evaluation of Parsons Brinckerhoff should be in the City's contract file pursuant to HRS § 103D-304(e) and (f), HAR § 3-122-63(b) and HRS § 92F-12(a)(3) pertaining to government purchasing information including all bid results.

As recently reported in The Honolulu Advertiser the proposed airport route and the Lagoon Drive-Aolele Street station, as described in the EIS documents prepared by Parsons Brinckerhoff, significantly encroaches into the federally required runway protection buffer for Honolulu International Airport runways 22L/4R and 22R/4L.

The Honolulu Advertiser also recently reported that the State Department of Transportation informed City officials of this rail alignment encroachment problem in a letter dated August 9, 2006. In this letter, Brian Sekiguchi, Deputy Director - Airports, of the State of Hawaii Department of Transportation said: "In addition, please be aware of height restrictions, especially at the area near Lagoon Drive which is the runway approach area for Runway 4R and 4L."

Wayne Yoshioka, the Director of the City Department of Transportation Services initially claimed in response to The Honolulu Advertiser story that the City was first made aware of this runway encroachment problem in mid-2009. This statement is not true and appears to have been intended to avoid scrutiny from the City administration's successfully urging the City Council in January 2009 to change the rail alignment from the Salt Lake Boulevard route to the airport route without first adequately publicly disclosing the substantial additional costs that will be incurred by this change and without providing the City Council with this cost information before the Council's January 2009 vote.

A re-design and relocation of the runways many hundreds of feet makai of the existing runways, as the City initially preferred, would probably have to be done at a significant additional cost to taxpayers and will also likely trigger a separate Hawaii and federal EIS process for the proposed runway relocations which will apparently be close to or into the ocean, and as a result will trigger other types of mandatory governmental agency reviews, that will add substantial costs and create further delays for the rail project.

The Honolulu Advertiser reported on April 9, 2010 that to avoid the substantial costs of moving runways 22L/4R and 22R/4L, the City is now proposing to move the rail station on Lagoon Drive to the Ualena Street intersection. Mr. Yoshioka said this proposal will require further study of the affected properties, and approval by the Federal Transit Administration. This alternative should have been investigated by Parsons Brinckerhoff and the City long before the City's announced alignment change to the City Council on April 8, 2010. If this new alignment is not in the Alternatives Analysis or in other EIS documents prepared by Parsons Brinckerhoff, an environmental assessment ("EA") or an additional supplemental EIS may have to prepared. See *Sierra Club v. Department of Transportation*, 115 Hawaii 299, 167 P.3d 292 (2007); *Unite HERE! Local 5 et al. v. City and County of Honolulu et al.*, Supreme Court of Hawaii, No. 28602, April 8, 2010; HRS § 343-5, Applicability and requirements (for an environmental assessment).

The City Auditor's October 2009 report, "Audit of the Department of Transportation Services' Honolulu High-Capacity Transit Corridor Project Contracts," which covered $107,700,00 in contracts issued to Parsons Brinckerhoff/PB Americas and InfraConsult, confirms that the City awarded Parsons Brinckerhoff on August 26, 2005 a $10,200,000 contract to produce an Alternatives Analysis and draft EIS for the rail project. This report also confirms that

Parsons Brinckerhoff received its $86,000,000 second contract for preliminary engineering and the final EIS on August 24, 2007.

Parsons Brinckerhoff was therefore extensively involved with the City on the rail project design and EIS alternatives analysis since at least August 2005. The recent news reports regarding the airport rail alignment controversy indicates that the public interest does not appear to have been well served by the City's awards of large rail contracts with Parsons Brinckerhoff.

HAR § 3-122-66, "Waiver to Requirement for Procurement of Professional Services," violates HRS § 103D-304(g) and is invalid

HAR § 3-122-66, Waiver to Requirement for Procurement of Professional Services," was promulgated on December 15, 1995, and is clearly inconsistent with the language and intent of HRS § 103D-304 and is therefore invalid because it violates the mandatory "minimum of three persons" requirement contained in HRS § 103D-304(g) and the Legislature's clearly stated intent in amending this statute in 1995, 1997, and in 2003, as described in this letter.

HAR § 3-122-66 purports to provide the head of a purchasing agency with discretion, not authorized by the statute, to award a contract under section (a)(1) from a Short List containing less than three persons. There has been no such authority in HRS § 103D-304 since July 1, 1995.

A. 1995 Deletion of "Unless fewer than three submissions have been received . . ."

More than six months before the first version of HAR § 3-122-66 took effect, the Legislature passed the enabling legislation to Act 178 (H.B. No. 1834, Section 10), which took effect on July 1, 1995. In this bill, the Legislature deleted from HRS § 103D-304(d) the following language: "Unless fewer than three submissions have been received, the screening committee shall conduct discussions with at least three persons regarding the services which are required and the services they are able to provide."

This deleted language was originally part of Act 8 (S.B. No. 8-93) (1993), the enabling legislation to the1993 Hawaii Public Procurement Code. The 1995 legislation was the legislature's first successful effort after 1993 at revising the Code.

There is no discussion in the legislative history of Act 178 (1995) of the intent of this "[u]nless fewer than three submissions have been received" language deletion. There is also no discussion in the legislative history of Act 8 (S.B. No. 8-93) (1993) of original intent of this language. However, the meaning of this language deletion in 1995 is clear.

The original Act 8 (S.B. No. 8-93) (1993) "[u]nless fewer than three submissions have been received" language appears to have been only source of the authority for HAR § 3-122-66

since this rule section has always and only cited to HRS §§ 103D-202, and 103D-304 as the bases for its authority.

HRS § 103D-202 simply states that "the policy board shall have the authority and responsibility to adopt rules, consistent with this chapter . . ."

The "[u]nless fewer than three submissions have been received" scope of HRS §103D-304 was obviously significantly changed in 1995, but no one who had any part in the drafting, issuance, and revision of HAR Chapter 3-122 after Act 178 took effect on July 1, 1995, addressed this significant statutory change and deleted HAR § 3-122-66 as no longer having any statutory foundation.

It is well settled that administrative rules must follow the statutory language of the authorizing statute and that "[a]n agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose. *Id.* at 216, 685 P.2d at 797; 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 7.22 at 105-06 (2nd ed. 1979)." *International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone Company.*, 68 Haw. 316, 322, 713 P.2d 943, 950 (1986) (quoting *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, however, the agency's decision must be consistent with the legislative purpose. *Morton v. Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir.1976).") (underscore added). *See also Jou v. Hamada*, 120 Hawai'i 101, 108, 201 P.3d 614, 621 (App. 2009) ("The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose.") (underscore added).

In addition, "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down." *Haole v. State*, 111 Hawai'i 144, 152, 140 P.3d 377, 385 (2006) (quoting *Stop H-3 Association v. State Department of Transportation*, 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (underscored added).

HRS § 91-7, Declaratory judgment on validity of rules, states in relevant part that: "(b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency." (underscore added)

B. 1997 Addition of "minimum of three persons"

In 1997, in Act 21 (S.B. No. 910, S.D.1), the legislature added the "minimum of three persons" requirement which now appears in HRS § 103D-304(g). Act 21 took effect on its approval on April 14, 1997.

The Senate Government Operations and Housing Committee stated in Senate Standing Committee Report No. 558 to accompany S.B. No. 910, S.D.1 (1997): "The purpose of this bill is to require, in the procurement of professional services, that the screening committee submit a list of at least three names to the head of the purchasing agency."

The House Finance Committee said in House Standing Committee Report No. 1329, to accompany S.B. No. 910, S.D.1 (1997): "The purpose of this bill is to require, in the procurement of professional services, that the screening committee submit a list of at least three names, instead of only three names, to the head of the purchasing agency."

If the "[u]nless fewer than three submissions have been received" language deletion in Act 178 (1995) had been unclear, the "submit a list of at least three names" intent in 1997 in Act 21 could not have been a clearer, simple, explicit statement of legislative policy. Again, however, no one who had any part in the drafting, revision and re-issuance of HAR Chapter 3-122 addressed this additional significant statutory change and deleted HAR § 3-122-66 as no longer having any statutory foundation.

C. 2003 Continuation of "minimum of three persons" requirement in HRS § 103D-304

The "minimum of three persons" requirement in HRS § 103D-304 was retained and carried forward in 2003 in Act 52, Section 5 in new subsection (g), to continue the legislative and state executive branch policies of avoiding favoritism and the appearance of favoritism in the awarding of public procurement contracts for professional services. However, HAR § 3-122-66 was not deleted from any subsequent revisions to HAR Chapter 3-122 to embody this policy.

D. The "minimum of three persons" requirement cannot be waived

The City Auditor's October 2009 report did not address the validity of HAR § 3-122-66 and instead merely referred to a waiver of the "standard minimum of three bids under HAR Section 3-122-66" as complying with the Procurement Code.

As stated above, however, design professional services are **not procured through a bid process** because design services are procured from the most qualified professional if a fair and reasonable price can be negotiated with the selected professional.

The Procurement Code requirement to have 3 names of the Short List is never optional but has been mandated by the Procurement Code since 1997. HAR § 3-122-66 is accordingly invalid because it does not comply with the Procurement Code.

Arguably, a committee that submits a Short List with less than three names might do so as a practical matter if the committee had first contacted all design firms who qualified for the contemplated work and all such design firms except for InfraConsult, for example, said in

response that they would not provide management and design services for the rail transit project. However, even this exceptional circumstance is not authorized in HRS § 103D-304.

Nowhere in the City Auditor's report is there any confirmation that only InfraConsult was willing to negotiate a reasonable and fair price for design work on the rapid transit project. Instead, the Auditor's report states in its Conclusion that "Our interviews indicate that other firms have been discouraged from submitting bids due to [PB Americas] decades-long relationship with the city. . . . the perception of favoritism persists among other firms in the industry. In addition, InfraConsult's origins as a firm established by ex-employees of PB Americas contributes to the idea that firms connected to PB Americas have a greater than average chance to participate in the project." (bracketed material added for clarification).

If HAR § 3-122-66 is somehow valid without having any statutory support and being contrary to the "minimum of three persons" requirement in HRS § 103D-304(g), there are nonetheless legitimate questions of whether or not the $36,727,162.00 contract awarded to InfraConsult is "fair and reasonable,"and whether or not "other prospective offerors had reasonable opportunity to respond" to the City's contract announcement. The City's contract files should have all of the documentation to support its contract award under these criteria.

E. HRS § 103D-707, Remedies after an award, authorizes the termination of a contract that is in violation of HRS § 103D-304; Termination is the preferred remedy

HRS § 103D-707 states in relevant part:

> If after an award it is determined that a solicitation or **award of a contract is in violation of law**, then:
>
> (1) If the person awarded the contract has not acted fraudulently or in bad faith:
>
> (A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or
>
> (B) **The contract may be terminated** and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination; (emphasis added)

As stated above, any selection from short list of professional service providers of less than a minimum of three persons, and any contract award to a person not ranked first on a proper short list containing a minimum of three persons without first unsuccessfully negotiating with the first person are violations of HRS § 103D-304(g) and (h).

The Hawaii Supreme Court stated in *CARL Corporation v. State, Department of Education ("CARL I")*, 85 Hawai'i 431, 455-456, 946 P.2d 1, 25-26 (1997):

> To determine whether the ratification of an unlawfully awarded contract is in the State's best interests, **consideration must also be given to the State's interest in achieving the purposes of the procurement code, which are revealed by its legislative history**:
>
> > The purpose of this bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.
> >
> > Specifically, the bill establishes a new comprehensive code that will:
> >
> > (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system;
> >
> > (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and
> >
> > (3) Increase public confidence in the integrity of the system.
> >
> > Senate Standing Committee Report No. S8-93, in 1993 Senate Journal, at 39.

As the Supreme Court of New Mexico explained in *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 885 P.2d 628 (1994):

> > The purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. Of all the interests involved in competitive bidding, the public interest is the most important. An economical and efficient system of procurement directly benefits taxpayers. . . . It is certainly in the public interest that the [State] abide by the procurement rules it has set for itself.

Id. at 710, 885 P.2d at 631 (citations and internal quotation marks omitted). **The public interest in the integrity of the procurement code cannot be ignored**

> **when determining whether it is in the best interests of the State to ratify an unlawfully awarded contract**. (emphasis added).

The Supreme Court noted that "[t]he essence of CARL's protest was that 'this was not an open procurement and that another vendor was predetermined from the outset.'" *CARL Corporation*, 85 Hawai'i at 434, 946 P.2d at 4.

The Court further noted that "**[t]he procurement code was enacted in an attempt to address real problems making daily headlines**. The Code prescribes strict procedures for the procurement of goods and services by State agencies, for the purposes of: (1) providing fair and equitable treatment of all persons dealing with the government procurement system; (2) fostering broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency; and (3) increasing public confidence in the integrity of the system." *CARL Corporation*, 85 Hawai'i at 459, 946 P.2d at 29. (emphasis added).

The Court reiterated this view in its subsequent ruling in the case. *CARL Corporation v. State, Department of Education ("CARL II")*, 93 Hawai'i 155, 172, 997 P.2d 567, 584 (2000).

HAR § 3-126-35 through § 3-126-38, pertain to a Determination that Solicitation or Award Violates Law, and states in HAR § 3-126-38(a)(4) that "**Termination is the preferred remedy**." This administrative rule subchapter took effect on May 20, 2004.

HAR § 3-126-36, Violation determination, states in relevant part:

> (a) A solicitation or award may be in violation of the law due to actions of state or county employees, bidders, offerors, contractors, or other persons. After consultation with the respective attorney general or the corporation counsel, as applicable, the chief procurement officer or designee may determine that a solicitation or contract award is in violation of the provisions of chapter 103D, HRS, or the rules adopted under the chapter.

HAR § 3-126-38, Remedies after an award, states in relevant part:

> (a) When there is no fraud or bad faith by a contractor:
>
> (1) **Upon finding after award that a** state or **county employee has made an unauthorized award of a contract** or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable. (emphasis added)

(2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified, and affirmed.

(4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or designee shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. **Termination is the preferred remedy**. The following factors are among those pertinent in determining the State's best interest: (A) The costs to the State in terminating and resoliciting; (B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination; (C) The progress made toward performing the whole contract; and (D) The possibility of obtaining a more advantageous contract by resoliciting. (emphasis added)

(5) Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, if possible, unless the determination required under paragraphs (2) through (4) is made. If the contract is terminated, the State shall, where possible and by agreement with the supplier, return the goods delivered for a refund at no cost to the State or at a minimum restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination, other than attorney's fees. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance was completed. Anticipated profits are not allowed.

HAR § 3-126-38(b)(6) states: "If a state or county employee knowingly and willfully lets a contract contrary to law; that employee may be personally liable for his or her actions."

The "[t]ermination is the preferred remedy" policy in HAR § 3-126-38(a)(4) has not been the subject of a published appellate decision in Hawaii.

Conclusion

The legislature amended HRS § 103D-304 several times (1995 Act 178, 1997 Acts 21 and 352, 2000 Act 141, and 2003 Act 52) in repeated efforts to eliminate favoritism and "pay to play" from the awarding of non-bid contracts for professional design services. The combination of the language deletion enacted in 1995, and the "minimum of three persons" requirement originally enacted in 1997, clearly requires that every contract award for the procurement of professional services must first be based on a review of a "minimum of three persons" who are qualified to provide the services requested.

In 2003 (**Act 52 - Attachment 12**), the legislature stated: "The purpose of this Act is to establish procurement policies and procedures that: (1) Ensure in-state contractors' ability to win awards of public funds for state contracts; (2) Promote public confidence in the integrity of the procurement process; (3) Increase openness in the award of . . . professional services contracts." The City's awards of the largest rail contracts to date to Parsons Brinckerhoff and InfraConsult do not appear to have adequately satisfied these legislative purposes.

The legislative history and language of HRS § 103D-304 clearly does not support a contract award of the kind that the City and County of Honolulu awarded to InfraConsult based on it purportedly being the only person listed on a Short List. The public policy embodied in this statute requires a competitive selection process among at least three qualified persons.

The Senate Committee on Transportation, Military Affairs and Government Operations said in Senate Standing Committee Report No. 876, to accompany S.B. No. 1262, the enabling legislation to Act 52 (2003) the following:

> Your Committee has further amended section 103D-304, HRS, to provide that design professional services such as architect services, shall only be procured under section 103D-304, HRS, or emergency procurement procedures. Your Committee believes that the unique nature of design professional services justifies this amendment.
>
> Your Committee also amended section 103D-304, HRS, further to require an equal distribution of work among providers that have the same qualifications. This amendment will help ensure that all qualified providers are granted state contracts.

These legislative policies are incorporated into the language of HRS §103D-304(a) and (g).

The City has also violated the central safeguards required in the selection of design professionals of having a minimum of three persons on the Short List and negotiating first with

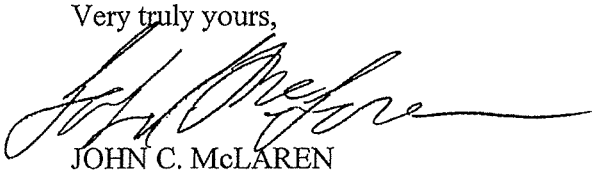
the first ranked person. Why was Earth Tech, Inc., not awarded the August 26, 2005 contract that the City awarded to Parsons Brinckerhoff, in spite being ranked first ahead of Parsons Brinckerhoff?

The City has never explained this award or any other award where the first ranked persons did not receive the contact. The City's violations of these clear, basic, and essential safeguards for the public interest indicates that City government officials are intentionally violating the Public Procurement Code.

The rail project's billions of dollars in state and federal taxpayer funds for contracting must strictly comply with the Hawaii Public Procurement Code. Given the contracts that violate the Code identified in this letter, an immediate, thorough investigation of the City's contracting violations is necessary to protect the public's funds. The stated public policy of contract termination as the preferred remedy should be thoroughly explored.

Thank you for your interest and for your prompt investigation of the information summarized in this letter.

Very truly yours,



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